UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: JEFFERY ALLEN DAVIS, Movant.	No. 07-5129 (D.C. No. 07-cv-00459-GKF-PJC)

ORDER
Filed October 23, 2007

Before **LUCERO**, **TYMKOVICH**, and **HOLMES**, Circuit Judges.

Movant Jeffery Allen Davis has filed a motion for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition seeking to challenge his 1993 Oklahoma state convictions. He filed his motion for authorization after first attempting to file an unauthorized § 2254 petition in the district court, which transferred the matter to this court in accordance with *Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997) (per curiam). We deny authorization.

Mr. Davis was convicted in 1993 for second degree murder, attempted robbery with firearm, two counts of shooting with intent to kill, and robbery with firearm. He did not file a timely direct appeal of his conviction. He filed his first § 2254 petition in 2004. The district court denied his petition as time-barred, and

this court denied Mr. Davis a certificate of appealability. *Davis v. Ward*, No. 05-5020 (10th Cir. Aug. 17, 2005) (unpublished order).

In his motion for authorization, Mr. Davis states that he wishes to assert two claims: (1) prosecutorial misconduct because the prosecution knowingly used perjured testimony, and (2) ineffective assistance of counsel because his counsel failed to introduce exculpatory records into evidence. To obtain permission to file a second or successive § 2254 petition, Mr. Davis must show that he has not raised his claim in a previous habeas petition, 28 U.S.C. § 2244(b)(2), and that his new claim either "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," *id*. § 2244(b)(2)(A), or depends on facts, previously undiscoverable through the exercise of due diligence, that would establish by clear and convincing evidence that he was not guilty of the offense, *id*. § 2244(b)(2)(B). With respect to both claims, Mr. Davis asserts that he is relying on newly discovered evidence. He claims that he only recently obtained copies of his trial transcripts and his co-defendant's plea agreement, and thus, did not know his co-defendant's charges were dismissed as a result of his trial testimony against him.

Mr. Davis's asserted new evidence does not meet the requirements of § 2244(b)(2)(B) for two reasons. First, he has not met his burden to demonstrate that his new evidence "could not have been discovered previously through the

exercise of due diligence," as required by § 2244(b)(2)(B)(i). His trial transcripts have been available since his conviction, and he gives no explanation for why he was unable to obtain his co-defendant's plea agreement. *See Babbitt v. Woodford*, 177 F.3d 744, 746-47 (9th Cir. 1999) (holding that movant failed to make a prima facie showing under § 2244(b)(2)(B) where evidence was discoverable through due diligence since conclusion of trial). Second, Mr. Davis has not shown that his purported new evidence establishes by "clear and convincing" proof that he is not guilty of the underlying offense, as required by § 2244(b)(2)(B)(ii). In this regard, we note that Mr. Davis did not actually submit any evidence in his motion for authorization; his motion merely includes his short and conclusory allegations, which are insufficient to satisfy his burden.

Accordingly, authorization is DENIED. This denial of authorization is not appealable and may not be the subject of a petition for rehearing or for a writ of certiorari. *See* 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court,

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk